Supreme Court, U.S.
FILED

NO. 93-602

IN THE

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1993

ANA M. OLIVAREZ, WARDEN OF THE
DEUEL VOCATIONAL INSTITUTION
OF THE STATE OF CALIFORNIA,

Petitioner,

v.

MICHAEL SHERIDAN MCKINNEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(AFTER GRANT OF CERTIORARI AND REMAND)

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the introduction of character evidence to show propensity in a closely-balanced case constitutes *per se* a violation of Due Process and, if so,

2. Is the application of such a rule contrary to *Teague v. Lane*, 489 U.S. 288 (1989) as applying a "new rule" for the first time on collateral review?

3. If a state appellate court has found that permissible inferences were raised by certain evidence and that the evidence was probative of issues in dispute, are such findings binding under *Sumner v. Mata*, 449 U.S. 539 (1981), as facts which the collateral reviewing court must treat deferentially or are such findings legal conclusions which the collateral reviewing court can completely ignore?

4. Separately, does the failure by the collateral reviewing court to recognize the permissible inferences found by the state appellate court violate this Court's holding in Estelle v. McGuire, 502 U.S. ___, 112 S. Ct. 475, 116 L.Ed.2d 385 (1991) by ignoring the permissible inferences to be drawn from the introduction of the evidence, rather than, as in Estelle, finding that the permissible inferences do not relate to a matter in dispute.

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INTRODUCTION

Petitioner intends, in this reply brief, only to address new matters raised in "Respondent's Brief in Opposition, etc." (hereinafter referred to as "opposition") which impact upon matters contained in the petition for writ of certiorari. This reply brief will not address the merits of arguments in the

opposition that petitioner concludes have been adequately refuted by the petition itself. Accordingly, the fact that a matter contained in the opposition is not addressed in this reply is not meant as a concession as to the accuracy or merit of that point.

ARGUMENT

I

THE OPPOSITION VALIDATES THE NECESSITY FOR THE CREATION OF A SPECIFIC TEST TO DETERMINE WHETHER A TRIAL IS FUNDAMENTALLY UNFAIR

In the petition for writ of certiorari, petitioner argued that the term "fundamentally unfair," as has been applied to bar the introduction of ordinary evidence in a state criminal trial that offends no other specific constitutional guarantee, is in need of a specific test delineating when it can be said to exist. Petitioner submitted that a lack of "fundamental fairness" can only be occasioned by the introduction of evidence at a state criminal court trial where the evidence 1) has no logical relationship to the question of guilt or innocence, and, 2) creates a strong tendency to convict the defendant for

reasons other than his guilt or innocence of the charges upon which he was tried, and, 3) nullifies the defendant's right to a fair trial as shown by the fact that in the absence of the introduction of the evidence, no rational jury would have convicted him. Petn., pp. 51-52.

Petitioner's plea for the need for such a test was occasioned by the decision below where the Ninth Circuit utilized the fact that there was no definition of the term to deem the admission of knife evidence to be "fundamentally unfair" in a knife killing case. In the first section of his opposition, respondent attempts to argue that the admission of the evidence was "fundamentally unfair." However, in so doing, respondent helps to illuminate the breath of discretion possessed by federal habeas reviewing courts under this undefined test and the

need for a defining test.

Respondent argues that the Ninth Circuit "simply" followed a two-step analysis of whether the admission of the alleged propensity evidence was "an error of such magnitude" that it violated his right to a fundamentally fair trial and whether the "error" had a substantial and injurious effect on the verdict. Opposition, pp. 7-8. However, one might ask for clarification of the word "error."

Certainly, by "error," petitioner cannot be referring to state law error because Estelle v. McGuire, 502 U.S. ___, 112 S.Ct. 475, 480 (1991), the decision in light of which this case was remanded back to the Ninth Circuit for further consideration, plainly held that an "error" under state law is no guide in determining the propriety of the admission of evidence at the state court level on a

petition for writ of habeas corpus under 28 U.S.C. § 2254.

More certainly, by "error," respondent cannot be referring to federal law error, because neither respondent nor the Ninth Circuit has been able to point to any federal statute prohibiting the introduction, in state court criminal trials, of propensity evidence.

Lastly, by "error," petitioner cannot be referring to some federal "constitutional evidence code" because it does not exist. This illuminates the fact that fundamental unfairness can only be defined as fundamental unfairness itself and not as any independent error. It means, correspondingly, "fundamental unfairness," as illustrated by the case at bar, means whatever the subjective opinion of the federal habeas reviewing court deems it to be. This, in turn, means that

"error" exists in the introduction of ordinary evidence in state court criminal trials whenever the federal habeas corpus reviewing court forms the subjective opinion that the evidence introduced is "unfair."

Even respondent's use of the phase, "an error of such a magnitude," in his recapitulation of the finding of the Ninth Circuit causes question. Opposition, p. 7. The word, "magnitude," has its origins in the french word *magnus*, meaning "great." However, the Ninth Circuit did not claim to find any "great" error that is necessary to designate a trial as being fundamentally unfair. Instead, it merely found that the case was "closely-balanced" and that it was "more than reasonably likely that the jury did not follow its instructions to weigh all the evidence carefully." See Petn., Appendix A, pp.

103-104.

For respondent, this means his assertion that the Ninth Circuit found some error of "magnitude" is incorrect. For petitioner, it demonstrates that the gravity of the above concern, that federal habeas reviewing courts are allowed to find due process error merely because they subjectively believe the evidence to be inadmissible or improper, regardless of what a state court believes, and measure "fundamental unfairness" by whether 1) the case is "closely balanced" and 2) it is "reasonably probable" that the jury credited the evidence.

Next, in the opposition, respondent, quoting Lisenba v. California, 314 U.S. 219, 236 (1941), defines due process error as the "'failure to observe that fundamental fairness essential to the very concept of justice . . . [where] the

absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial..'" However, it is petitioner who enthusiastically endorses this definition and it is the Ninth Circuit that has cast it aside.

The state appellate court found that respondent's possession of, fascination with, and use of knives was probative on whether he possessed whatever missing knife was responsible for the murder or whether he had truly rid himself of his knives prior to the murder. See Petn., Appendix I. Ignoring this, the Ninth Circuit found that the evidence was offered simply to show that respondent was more likely to have committed the murder because of his past association with knives.

Setting aside the question of

deference to state court findings, the Ninth Circuit simply found the evidence to be "unreliable." This is a far cry from finding a "failure [of] fairness essential to the very concept of justice," or something that "fatally infected" the trial, or an action "of such quality as necessarily prevents a fair trial." To the contrary, as shown above, the Ninth Circuit's finding was of no such "magnitude" as it simply found that in its opinion the evidence was "unfair" and that it was "reasonably probable" that the jury gave weight to the evidence in this closely balanced case. Accordingly, it is the Ninth Circuit that has betrayed Lisenba, not petitioner.

Next, respondent tries to convince this Court that "propensity evidence" is "fundamentally unfair" because "the principle is established not only in the

Federal Rules of Evidence, but also in the laws of all fifty states."[1] Opposition, p. 8. However, if respondent were correct, then the Due Process Clause would not only be known to guarantee that each person not be deprived of life, liberty, or property "without due process of law" but to include the addendum "or any other right contained in any legislative rule recognized by all jurisdictions in the nation." This is clearly not the case. Policy determinations made by bodies with

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1. In some respects, the Ninth Circuit's and petitioner's reliance on the law in all fifty states is a red herring. All fifty states have rules of evidence that allow for the admission of habit and custom evidence, which, along with their holding that the evidence was admissible to show issues in dispute, formed the basis of the judgment of the California Court of Appeal in this case that the evidence was properly admitted. However, the Ninth Circuit disagreed with the state court on this issue, although as will be shown infra they ignored the state court findings, thereby forcing the "propensity" issue in this case.

rule-making, and thus policy determining, powers are not synonymous with constitutional principles. Moreover, whether or not a state rule of evidence has been rejected by other states has never been, intrinsically, a basis for a finding of a due process violation. See, e.g., Chambers v. Mississippi, 410 U.S. 284, 298-300 (1973) [fact that other states no longer adhered to property interest exception to hearsay rule did not, by itself, establish due process violation.]

Next, like the toddler who offers his mother a cookie after being caught raiding the cookie jar, respondent attempts to convince this Court that the evidence offered against him "really should not have been admitted," thereby hoping that this Court will repeat the same error of the Ninth Circuit in

substituting its own subjective assessment of the decision to admit the evidence for that of the state trial court. See Opposition, p. 9. However, in so stating, petitioner fails to address the essential thrust of the petition which is that whether propensity evidence should be admitted is a policy determination as long as the evidence is 1) relevant and, 2) bears on guilt or innocence. Whether the evidence is, as the Ninth Circuit deemed it, "too relevant," or "likely to be overvalued," or "untrustworthy," or "likely not to be put in proper perspective by the lay jury," is a policy and legislative, not a judicial, prerogative.

Thus, the Ninth Circuit has forgotten a fundamental tenet of due process review: "[T]he Bill of Rights speaks in explicit terms to many aspects

of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." Medina v. California, 505 U.S. ____, 112 S.Ct. 2572, 2576, 120 L.Ed.2d. 353 (1992). The latter sentence could also be correctly redrafted to refer to the "careful balance that the Constitution strikes between the rights of the States to conduct their trials and the power of the Writ to ensure compliance with the federal constitution."

Next, in his opposition, respondent concedes that findings that the admission of ordinary evidence rendered a trial fundamentally unfair are "rare," a concession which seems itself oddly

incongruous in the context of the defense of a decision that has found the introduction of "knife evidence" to be fundamentally unfair in a "knife killing case."

In any case, respondent lists as examples of such "rarities" four cases, three of which are perfectly explicable in light of petitioner's proposed test. First, respondent lists Osborne v. Wainwright, 720 F.2d 1237 (11th Cir. 1983), which respondent characterizes as a "remand to decide whether admission of exceptionally gruesome photographs in a closely balanced case so inflamed the jury as to deny a fundamentally fair trial." Opposition, p. 10. However, normally, such gruesome photographs would 1) not bear logically, in most contexts, on the question of guilt or innocence, 2) have a strong tendency to convict the defendant

for reasons other than the defendant's guilt, i.e., out of sympathy for the victim(s), and 3) if it could be said that no rational jury would have convicted the defendant in the absence of the photographs, then the trial was fundamentally unfair.

Respondent also noted the case of Panzavecchia v. Wainwright, 658 F.2d 337 (5th Cir. 1981) which he summarizes as "admission of evidence of a prior conviction had only gone to propensity and had denied defendant a fundamentally fair trial." Opposition, p. 10. However, a prior adjudication of guilt in an unrelated proceeding may 1) not having any bearing on the defendant's guilt in the present proceeding, and 2) might have a strong tendency to convict the defendant for reasons other than his guilt on the present charges - i.e., based on the prior

adjudication, which 3) would be fundamentally unfair if it could be said that in the absence of the admission of evidence of the prior adjudication, no rational jury would have convicted him.

The difference between Panzavecchia and the instant case is that here the knife evidence 1) does bear logically on whether respondent had the weapons to commit the crime on its date, and, 2) had a tendency to convict respondent that was solely generated by suspicion that he in fact committed the crime for which he was being tried, and was such that 3) a rational jury could have convicted respondent even in the absence of the evidence.

Lastly, respondent notes the case of Bisaccia v. Attorney General of New Jersey, 623 F.2d 307 (3rd Cir. 1980), which he summarizes as "admission of

evidence of co-conspirator's guilty plea violated due process." In his summation, respondent neglected to add that the evidence of the co-conspirator's plea was admitted as substantive proof of the defendant's guilt and without a limiting instruction. Therefore, it can easily be seen that 1) a guilty plea by an alleged co-participant motivated by varied considerations might have no logical bearing on another person's guilt or innocence, but that 2) such evidence would have a strong tendency to convict the defendant for reasons other than his guilt on the charges, i.e., because of the co-participant's admission of guilt, and, therefore, 3) if no rational jury could have convicted the defendant absent the admission of the plea, the defendant would have been denied a fundamentally fair trial. As such, petitioner's test is

workable and should be adopted by this Court.

Next, respondent mischaracterizes petitioner's position as seeking to substitute the sufficiency of evidence test in Jackson v. Virginia, 443 U.S. 307 (1979) for the harmless error test in Brecht v. Abrahamson, 113 S.Ct. 1710 (1993). Respondent has a hopelessly garbled understanding of the petition.

Petitioner never urged replacing the Brecht harmless error test with the Jackson test because petitioner cannot imagine how a "fundamentally unfair" trial can ever be harmless. Petitioner's test was to define "fundamental unfairness;" not to suggest a test for determining when it can be harmless.

As stated above, petitioner urges that a federal habeas reviewing court, when contemplating whether the admission

of ordinary evidence works to violate due process, determine 1) whether the evidence is at all logically relevant to the question of guilt or innocence, if so, its admission is not fundamentally unfair, and 2) if the evidence has a strong tendency to tempt the jurors to convict the defendant for reasons other than his guilt on the charges for which he is being tried, if not, its admission is not fundamentally unfair, and 3) lastly, whether it can be said that in the absence of the evidence, no rational jury would have convicted the defendant. If the answer to those three questions are 1) no, 2) yes, and, 3) yes, then the trial was fundamentally unfair and no harmless error test is needed.

II.

THERE HAS BEEN NO TEAGUE V. LANE WAIVER

In the second section of his opposition, respondent argues that the decision of the Ninth Circuit does not create a "new rule" under Teague v. Lane, 489 U.S. 288 (1989), that if it does, it fits one of the exceptions, and, even if no exception is present, petitioner has "waived" his right to assert Teague by not raising it before. Petitioner, has answered the first two contentions in the petition and the third contention lacks gravity.

Respondent does not explain how a party can be said to have "waived" Teague when that party asserts Teague on a petition for certiorari immediately after the challenged decision is issued. Clearly, petitioner could not have

asserted Teague prior to the issuance of the decision.

Respondent, however, argues that petitioner could have asserted Teague as early as in the litigation in the United States District Court. Respondent forgets, however, that the ruling of the district court, as well as the first ruling of the Ninth Circuit, was predicated on McGuire v. Estelle, 902 F.2d 749 (1990). When this Court issued its ruling in Estelle v. McGuire, supra, gone was the legal underpinning of the decisions of both the United States District Court and the Ninth Circuit.

In fact, it was precisely because McGuire had been overruled that the Ninth Circuit found it necessary to create a new rule. As the Ninth Circuit itself stated, "Thus, we address the question left unanswered in Estelle . . .." Petn.,

Appendix A, p. 99. As such, the simple answer to respondent's assertion that petitioner should have raised Teague earlier is that the "new rule" complained of was only created in the decision that is the subject of the petition and did not exist earlier. This is especially true since the Ninth Circuit had to reject Petitioner's argument that the evidence was properly admitted in order to create its new due process rule of evidence. Accordingly, respondent's argument that petitioner "waived" Teague clearly lacks merit, even without consideration of whether Teague is waivable or the other interesting question of how respondent could possibly show any prejudice or detriment by reason of the alleged waiver.

III.

THE DECISION VIOLATES ESTELLE V. MCGUIRE AND SUMNER V. MATA

Respondent also argues that the decision of the Ninth Circuit neither violated Sumner v. Mata, 449 U.S. 539 (1981) or Estelle v. McGuire, supra. Opposition, pp. 15-17. Respondent's arguments are easily dispatched.

First, as to Sumner v. Mata, respondent merely states that the question of relevance is one of law and ends his argument immediately thereafter. He fails to address the argument in the petition that factual inferences, that rendered such evidence relevant, drawn by the state appellate court and entitled to deference by the federal habeas reviewing court, were ignored by the decision. Given his refusal to address this issue, respondent has made only a perfunctory and not

serious rebuttal of petitioner's contention that the decision violated Sumner v. Mata.

The same is true of respondent's argument that the decision does not violate Estelle. Respondent, as did the Ninth Circuit, ignores and does not even address the findings of the state appellate court. Those findings listed the legal relevance of all pieces of evidence challenged by respondent on federal habeas corpus. Rather than addressing those inferences raised and demonstrating their deficiencies, if any, respondent simply ignores them; almost in concession that those inferences found by the state appellate court rendered the evidence relevant to prove matters in dispute.

At best, therefore, respondent's act of ignoring the state appellate court

findings is an assertion by him that the Ninth Circuit "was not bound to consider the inferences found by the state appellate court," which, in turn, is precisely the reason that the decision violates Estelle v. McGuire, supra, where the Ninth Circuit found did not credit the fact that the State had offered the battered child syndrome evidence to show intent.

* * * * * *

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Petition for Writ of Certiorari should be granted.

DATED: November 23, 1993

Respectfully Submitted,

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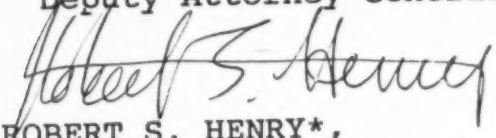

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